

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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| A-R CABLE SERVICES, INC. |) | |
| A-R CABLE PARTNERS |) | |
| CABLEVISION OF FRAMINGHAM, INC. |) | |
| CHARTER COMMUNICATIONS |) | |
| GREATER WORCESTER CABLEVISION, INC. |) | |
| MEDIAONE OF MASSACHUSETTS, INC. |) | |
| MEDIAONE OF PIONEER VALLEY, INC. |) | |
| MEDIAONE OF SOUTHERN NEW |) | |
| ENGLAND, INC. |) | Docket D.T.E. 98-52 |
| MEDIAONE OF WESTERN NEW |) | |
| ENGLAND, INC. |) | |
| MEDIAONE ENTERPRISES, INC. |) | |
| MEDIAONE OF NEW ENGLAND, INC. |) | |
| PEGASUS COMMUNICATIONS |) | |
| TIME WARNER CABLE |) | |
| |) | |
| Complainants, |) | |
| |) | |
| v. |) | |
| |) | |
| MASSACHUSETTS ELECTRIC COMPANY |) | |
| |) | |
| Respondent. |) | |
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**INITIAL BRIEF OF
MASSACHUSETTS ELECTRIC COMPANY**

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I. Introduction and Summary of Issues.

This proceeding stems from a Complaint filed by certain cable television (CATV) operators^{1/} under M.G.L.A. c. 166 § 25A (1997) regarding pole attachment rate increases proposed by Massachusetts Electric Company (“Mass. Electric”). Following discovery, two days

^{1/}As listed above.

of hearings (held on August 10 and 12, 1998), and the filing of exhibits, record request responses and post-hearing motions,^{2/} the Complainants and Mass. Electric dispute a limited number of issues relative to certain cost components in the Department's fully allocated rate formula for CATV pole attachment rates. The issues still contested by Complainants and Mass. Electric include the proper ratemaking treatment of:

- ! Appurtenances
- ! FAS 109
- ! Usable space including the worker safety space and the five inches at the top of the pole.

For the reasons set forth below, Mass. Electric urges the Department to adopt the recommendations of Mass. Electric on each of these issues, with the result that CATV attachers will bear an equitable share of the costs associated with their use of Mass. Electric's poles.

II. Calculation of the Rate.

The calculation of the pole attachment rate for Mass. Electric was performed by Mr. Webster (Ex. MECO-13, pp. 57-83; Ex. MECO-14, pp. 150-57, as revised in Ex. MECO-19 and further revised to adjust for metal poles in RR-Cable-1). Mr. Glist provided the calculations for Complainants (Ex. Cable-1). A reconciliation of the differences between parties is included in Ex.

^{2/}The Hearing Officer has not yet ruled on Mass. Electric's August 19, 1998 letter requesting that the Department reject Complainants' Reply to Answer of Massachusetts Electric Company. The letter and the motions it refers to concern Complainants' refusal to provide certain financial data to the Department and Mass. Electric on a public basis.

MECO-19 with the exception of the adjustment for metal poles by Mass. Electric reflected in the response to RR-Cable-1 that affects the calculation for solely owned poles by \$.03.

A. Allocation of Appurtenances.

The determination of the rate for cable television attachments has traditionally started by calculating the investment in bare poles (Ex. MECO-13, pp. 60, 62-63, RR-Cable-1, Att. 1, p. 1; lines A-H). In addition to the investment in poles, electric companies make various other investments in items such as guys, anchors, crossarms, pole top pins, and other equipment that are attached to the pole. Because these other investments, called appurtenances, do not always benefit cable television attachers, only a portion of the investments in appurtenances are included in the calculation of the rate for pole attachments. The benefit to cable television attachers and the amount of investment can both be contested issues in the calculation of the attachment rate. For example, the investment in guys and anchors benefits cable attachers because these investments stabilize the pole for all who are attached to it. Mr. Glist included this investment in the Complainants' calculation (Ex. Cable-1, p. 14). Other investment such as crossarms and transformer mounts are used for electrical equipment only and are appropriately excluded from the calculation. However, some investments such as the \$9.2 million investment in pole top pins benefits both electric and cable companies by allowing the electric company to maintain clearances on longer spans, reducing the number of poles per mile, and thus the required number of pole attachments for cable television providers (Tr. 1, pp. 133-36).

To avoid litigating the precise benefits of appurtenances in each case, the Department adopted a presumption that a 15 percent reduction in total net pole investment represented a reasonable allocation of these investments away from cable television operators in the calculation

of the attachment rate. Complaint and Request for Hearing of Cablevision of Boston Company, et al., D.T.E. 97-82 at 30 (1998) (Cablevision). Mr. Webster followed that approach in his calculation in this case (Ex. MECO-13, p. 63, 68; Ex. MECO-14, p. 150, Line E; see Cable-RR-1, Att. 1, p. 1, Line E).

Mr. Glist took an approach different from the Department's. Rather, Mr. Glist completed a specific analysis of the appurtenances on Mass. Electric's system that included the cost of guys and anchors in the pole attachment calculation and eliminated the remaining investment in appurtenances from his analysis (Ex. Cable-1, pp. 13-14, Sch. PG-4, Workpapers titled "Breakdown 364", pp. 1-3). Although Mr. Glist's decision to include only poles and guys in pole attachment rate is subject to debate,^{3/} the fundamental mistake in his calculation stems from his treatment of "Completed Construction Not Classified" which he eliminates entirely from his calculation of the pole attachment rate (Tr. 1, pp. 20-23). Completed Construction Not Classified includes investment in distribution plant, including investment in poles, guys, anchors, and other appurtenances, which has been completed and put in service but has not yet been "unitized" or separated into the seven digit FERC accounts (see Exs. MECO-1, MECO-2, MECO-3; Tr. 1, pp. 11-14). Mr. Glist's analysis has the effect of disallowing all of the \$30,951,421 of investment reflected in this account from the pole attachment rate calculation, even though a proportionate share of the investment is related to pole plant that is properly includable in the rate calculation and even though the poles themselves are included in account 106 in the pole inventory for the rate calculation (see Tr. 1, pp. 20-28, 92-94).

^{3/}For example, as explained above, the \$9.2 million of investment in pole top pins (Account 364.07.01) provide concrete benefits to Complainants by reducing the number of poles and attachments on Mass. Electric's system.

If Mr. Glist's analysis were completed properly, it would confirm the 15 percent presumption adopted by the Department and used by Mr. Webster in this case. Specifically, the allocation percentages derived from completed plant classified come quite close to the Department's 15 percent presumption. The investment in poles, guys, and anchors of \$183,557,448.78 that have been unitized, divided by total utility plant of \$218,956,542.06, produces an allocation of 83.83 percent or an appurtenance reduction of 16.17 percent. Because the allocation only addresses guys and anchors and does not include any portion of pole top pins^{4/} or other devices that benefit pole attachers, the percentages calculated confirm the reasonableness of the Department's 15 percent presumption. The presumption as reflected in Mr. Webster's analysis should be approved by the Department in this case.

B. FAS 109.

The second adjustment that divides Mr. Glist and Mr. Webster focuses on the treatment of the costs associated with FAS 109. Financial Accounting Standard No. 109 was issued in February, 1992 (Ex. MECO-4). The standard sets forth financial accounting standards for income taxes, and requires that temporary differences in taxes be recorded through assets and liabilities on the balance sheet (Ex. MECO-4, pp. 1414-15). For regulated enterprises including Mass. Electric, FAS 109 authorizes and contemplates that an equal and offsetting regulatory asset will be established pursuant to FAS 71 (Ex. MECO-4, p. 1422, ¶ 29), so that the net effect of the adjustments in FAS 109 will have no net effect on the Company's books. This approach was

^{4/}Inclusion of the \$9,234,081.54 investment in pole top pins in the analysis would increase the percentage from 83.83 to 88.05 percent and lower the deduction to 11.95 percent.

confirmed by FERC in its memorandum of April 23, 1993 (Ex. MECO-13, pp. 66-68; Ex. MECO-14, pp. 159-71).

To implement the policy in a way that does not affect rates, Mr. Webster made an adjustment to Mass. Electric's deferred tax balances to eliminate the adjustments for FAS 109 (see Tr. 1, pp. 38-42). These adjustments to eliminate the deferred taxes associated with FAS 109 deferred taxes were necessary because the plant balances used to calculate the rate did not include the equal and offsetting regulatory assets. As a result, the deferred tax adjustment was necessary to meet the objective articulated by both Mr. Glist and Mr. Webster that FAS 109 should not affect rates (Ex. Cable-1, p. 18; MECO-13, p. 67). Mr. Glist neither understood the accounting for FAS 109 nor made the appropriate adjustment to assure that it had no effect on the cable attachment rate (Tr. 1, pp. 29-42). Mr. Webster did. The Department should find that Mr. Webster's adjustment to deferred taxes to eliminate the effects of FAS 109 is appropriate, and approve it in this case.

C. 5-Inch Pole Top.

Mass. Electric has demonstrated that the top 5 inches of a distribution pole are unusable by any party and for any purpose. For simple physical reasons, attachments cannot be made to the top of a wood pole: Attachments to poles are made by bolts, which would split the pole apart if attached higher than 5 inches from the pole top (Anundson Testimony, p. 11). Appurtenances such as pole top pins and extenders are attached to poles by bolts placed at least 5 inches below pole top, rather than in the 5 inch zone. Accordingly, the highest usable attachment point on a pole is still 5 inches below the top (Id. at 12). Since no party can use the top 5 inches for attachments, it is appropriate to exclude this portion of a pole from "usable space". Indeed,

M.G.L.A. c.166 § 25A which defines “usable space” as “the total space which would be available for attachments...” dictates this treatment.

D. Worker Safety Space.

The single largest difference between the parties is the treatment of safety space in the calculation of the pole attachment rate. Mass. Electric classifies 40 inches of safety space between the electrical and communications equipment on the pole as “unusable”, requiring attachers to support an allocated share. Complainants treat it as space “usable” by others and, thus, do not support any portion of the costs of maintaining it in their rate calculation (compare Ex. MECO-13, p. 77 with Ex. Cable-1, p. 4).

Mass. Electric’s classification of safety space as unusable is based on the National Electrical Safety Code (NESC). The NESC is the recognized, authoritative set of rules governing electric distribution systems (and other elements of utility systems) throughout the United States. The inclusion of the word “safety” in its title underscores the NESC’s emphasis on protecting human life while promoting efficient utility performance standards (Clapp Testimony, pp. 7-9). Mass. Electric conforms its construction practices and procedures to the NESC (see Mass. Electric response to Cable-11).

A key issue in this proceeding is the equitable allocation of the costs of the worker safety space on Mass. Electric poles hosting CATV attachments. The 40 inch clearance at the pole between the lowest attachment in the power supply space and highest attachment in the communications space constitutes the worker safety space (NESC Rules 235 and 238; Clapp Testimony, pp. 11-12).

The worker safety space facilitates CATV and other communications entities to attach to poles that would otherwise carry only electrical conductors. This fosters the joint use of poles and eliminates the need for duplicative poles and pole investment by CATV operators. As the Maine Public Utilities Commission has reasoned:

We start from the premise that joint-use poles are less costly for each attacher than separate solely-owned poles. While a joint-use pole undoubtedly costs more than any single sole-use pole, because more height is needed, the cost of one joint-use pole is almost certainly less than the total cost of two or three sole-use poles. Utilities, cable television systems and their customers all benefit from the cost savings realized from using joint-use poles. The public further benefits in not having two pole lines (which may be the natural limit) on either side of every road.

Proposed Amendment to Chap. 88, Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure (Ch. 880), Docket No. 98-087, ___ P.U.R. 4th ___, slip op. at 6 (May 13, 1993).

By maintaining the safety space on jointly used poles, CATV operators realize substantial savings. Major costs avoided by CATV operators include extensive worker training and greater investments in sophisticated electrical equipment such as insulated bucket trucks.^{5/} The creation and use of the worker safety space on a utility pole is permissive under the NESC, not mandatory (Anundson Affidavit, p. 3). Although electric utilities such as Mass. Electric are required by state and federal laws and regulations (e.g., M.G.L.A. c. 166, § 25A, 47 U.S.C. 151 et seq., 47 C.F.R. § 69.1 et seq.) to grant access to their poles to telecommunications concerns, this access can be provided without maintaining safety space. The immediate consequence of not providing safety

^{5/}In its response to Cable-23, Mass. Electric provided information on its 30-month training program for line workers, which includes 72 days of classroom work, and data showing that trucks insulated for work on electric conductors cost roughly twice as much as trucks used by CATV.

space is that communications workers would have to meet the same equipment and training requirements that are applicable to electrical workers operating in the supply space. To avoid these costs, Mass. Electric has created and maintained the worker safety space on its poles, thus allowing CATV operators to attach at costs much lower than they would incur if the safety space did not exist.

Despite the benefits of the safety space that accrue primarily to communications and cable companies, the Complainants' witness, Mr. Glist has suggested that the costs of the worker safety space should be allocated to Mass. Electric (Glist Testimony, p. 25; Tr. 1, pp. 57, 87, and 101). His reasoning, though, is ill-founded. Mr. Glist suggests that the space is usable because the NESC allows streetlights to be attached in the safety zone. However, this use does not address the fundamental issue -- cables and wires must be excluded if the safety space is to be maintained. Appurtenances, including cable equipment, are often located in the "unusable" space on the pole. Mr. Glist admitted that CATV companies attach apparatus on poles outside the one foot presumably used by CATV attachers and in the unusable space below the minimum attachment height. Indeed, Complainants' witness conceded that CATV sometimes attach apparatus in the worker safety space (Tr. 1, pp. 79-81). In short, the worker safety space does not exist because of a need for street lighting space. It exists for the benefit of CATV and communications companies to maintain a separate communications space where highly trained electrical workers and more expensive equipment are not required.

The worker safety space provides a substantial economic and safety benefit to Complainants. As succinctly stated by a neighboring commission:

Communications employees work at a greater (and safer) distance from the electric conductors because of the neutral zone. Electric utility employees must work in the area of the electric conductors and would have to do so whether or not there was a neutral zone. The neutral zone, therefore, furnishes little additional direct benefit to electric utility employees.

Maine Public Utilities Commission, supra, at 10-11.

As the Department made clear in Cablevision, supra at 43-44, the amount of usable space on a pole is a rebuttable presumption. “This presumption may be rebutted if a company provides credible evidence . . . that its average usable space is materially different from 13.5 feet.” Various other state commissions have squarely rejected the presumption and defined the worker safety space as “unusable. Of particular regional interest is the Maine Commission’s removal of the worker safety space from “usable space,” as proposed by Mass. Electric in this proceeding.

We believe that inclusion of the entire neutral zone on all poles within the definition of attachable space is unreasonable. For the reasons explained above, the reason that the costs of the neutral space are incurred in the first place is that they are necessary in order to have a joint-use pole. These costs should be shared equally among the attachers using and gaining the benefits of the joint-use pole.

Maine Public Utilities Commission, supra, at 13.

In Kentucky, the state commission reached the same conclusion when it held, “[T]he Commission finds that it is reasonable to . . . [retain] the integrity of the NESC-required 40-inch clearance as non-usable space in situations involving the electric utility.” Re Cable Television Pole Attachments, 49 PUR 4th 128, 134 (1982). The Public Service Commission of Wisconsin has also adopted this understanding and realistic allocation of the worker safety space:

Applicant proposed to allocate the entire pole among the various users on the pole and then apply the percent of the pole allocated to

each user to the total annual carrying charge. In applicant's testimony, the portion of the pole in the ground and that required for minimum height is divided equally among all users of the pole. The neutral space is allocated totally to the users renting the space from the applicant, since the groups renting pole space create the need for the neutral space. . . . The commission has determined that a reasonable method to allocate pole space is based on usage of the total pole. The portion in the ground and that required for minimum height should be shared equally among all users. The neutral space should be allocated equally to those renting.

Application of Northern States Power Co. for Authority to Increase Retail Electric Rates, Wisc. P.S.C., 4220-ER-14, 1981 Wisc. PUC Lexis 73, 12 (1981).

Although other jurisdictions that have, for various reasons, taken an approach more akin to that suggested by Complainants, stinging dissents have underscored the inequities of including the worker safety space in the "usable space" component of the rate formula. In Illinois, for example, two commissioners filed separate opinions regaling the lack of "economic justification for allowing cable companies to escape paying their fair share for space that the Commission has previously determined they use and from which they also receive a safety benefit" and "the potential inequity" created in emerging competitive markets. Re Pole Attachments by Cable Television Systems, 149 PUR 4th 127, Slip op. at 13 (1993).^{6/} In the 2-1 Michigan order cited by Complainants' witness, the dissenting commissioner supported the Staff and ALJ's rejected positions and warned,

[T]he rate is unfair to the utility customer because the customer is then required to subsidize the attaching party. Removal of the subsidy and a full recovery of appropriate costs by the utility must,

^{6/}Originally, Illinois Commission rules had defined the worker safety space as unusable space, as Mass. Electric proposes. Under intense lobbying by the CATV industry, a legislative committee suspended the ICC's authority to issue pole attachment rules unless it redefined the worker safety space as "usable space".

therefore, necessitate an increase in the rate... The artificially low rate adopted by the majority today robs the electric ratepayers for the benefit of attaching parties who are under no compulsion to lower the cost of their services ...

Consumers Power Co., et al., 1997 Mich. PSC Lexis 26, 53 (1997).

Although Complainants have constantly referred to the FCC's historic inclusion of the worker safety space in usable space, they have omitted any mention of the FCC's pending reconsideration of its position on this issue. In response to its public announcement of a potential change in policy, the FCC has received numerous comments on the worker safety space or usable space issue. While it is not clear when the FCC will rule, the Department is not required to delay its own decision on this significant matter. Indeed, the Department has indicated that while the FCC's approach provides sometimes useful models and reasoning, as an independent body, the Department will not slavishly adhere to FCC decisions

By exercising our discretion, based on independent state grounds, to model our method on the FCC formula, the Department is not relinquishing its jurisdiction over pole attachment matters and is free to depart from the federal approach in the future should circumstances warrant to protect the public interest. In addition, the Department finds that proposed or future changes in the federal formula are not controlling in this case and are not persuasive for the purposes of setting current pole attachment rates.

Cablevision, *supra*, slip op. at 19 (1998).

Thus, the Department should properly classify the safety space as "unusable" in this proceeding and include it in the calculation of the pole attachment rate.^{7/}

^{7/}In the event that Department finds that the safety space is "usable", it should recognize that electric companies may move forward with attachments to maximize the use of the space on the pole, and recognize that this use could affect the worker training and equipment requirements of cable and other communication companies.

E. Mass. Electric's Rate is Just and Reasonable.

Mass. Electric has demonstrated, through testimony, discovery and hearings, that its rate proposal is designed to recover the costs that are appropriately allocated to cable companies in pole attachment rates. Under the statute, the Department must take into consideration the impact of Mass. Electric's proposal on both CATV and electric distribution customers. M.G.L.A. c. 166 § 25A (1997). Since Complainants have not turned over their financial data requested by Mass. Electric, it is difficult for the company to provide substantial evidence of the effect that Mass. Electric's proposed rate might have on CATV customers. Nonetheless, several facts have emerged that favor the Department's adoption of Mass. Electric's proposal.

First, the present rate paid by Complainants represents only a small fraction of the total cost of service for Mass. Electric poles. The percentage allocation based on only twelve inches of occupied space allocates substantially less costs for the distribution infrastructure to cable companies than to electric companies and Bell Atlantic, even if the formula is properly calculated.

Second, in response to MECO-8, Complainants stated that pole attachment rates currently cost CATV subscribers an average of 45¢ per month. Thus, if one assumes an average monthly CATV bill is \$25, the pole attachment component represents approximately 1.8 percent of the monthly bill. A straight flow-through of the rate proposed by Mass. Electric in Cable Record Request-1 would change the pole attachment component to 3 percent of a \$25/month CATV bill, an increase of only 1.2 percent.

Third, and perhaps most important for the Department's proper discharge of its statutory duty, Complainants have failed to bear the burden of proof as to the unjustness or

unreasonableness of Mass. Electric's proposal. Complainants, who bear the burden of proof in this proceeding, have not proved that the rate proposal is unjust and unreasonable.

As to impact on Mass. Electric, however, the record is clear:

1. Mass. Electric customers would be relieved to some degree of subsidizing CATV subscribers.
2. Once the formula components are established, Mass. Electric would not need to return to the Department for another expensive proceeding such as this one.

In combination, these factors provide very strong support for the adoption of Mass. Electric's proposed rates.

III. Conclusion.

This proceeding comes at an important time in the evolution of the electric utility industry in Massachusetts. As a result of the Electric Utility Restructuring Act of 1997 and regulatory orders by the Department, Mass. Electric has undergone a fundamental change in business scope and public purpose. Because of this change in business scope, the financial importance of the pole attachment ratemaking decision on host utilities like Mass. Electric has grown. Regulatory changes have made it more essential that each distribution company carry its own weight, while meeting important quality of service standards. The use of the poles by third parties represents one of the few revenue sources that can support the provision of distribution services to electricity ratepayers. In the newly restructured electricity environment, it is important to recognize that decisions about pole attachment pricing take place in a different context and have different import than they might have in the former environment.

This change in the regulatory landscape does not eliminate the need to treat CATV providers fairly, in that they, too, provide an important public service and have been directed under many of their municipal franchises to maximize the use of existing poles owned by the utility. It simply means that both the electricity distribution company and the CATV company, and their respective sets of ratepayers, should pay their fair share.

Here we have three public policy goals: first, to treat electricity monopoly service ratepayers fairly for their investment in facilities used to serve them; second, to treat CATV service ratepayers fairly for the investments need to service them; and third, to establish a ratemaking methodology which cannot be used to favor possible affiliates or business partners of the host utility who might be in a business related to or competing with the CATV providers.

The Department has addressed these public policy goals. In 1997, the Department opened a rulemaking to revise its rules on standards of conduct governing relationships between electric and gas distribution companies and their affiliates, “to address concerns raised by the increasing convergence of the business of electricity and gas distribution with other, non-energy businesses such as telecommunications and cable television.” Standards of Conduct, DPU/DTE 97-96, at 1 (May, 28, 1998). Among other issues, the Department considered the pricing of assets that are in utility service that might be used by affiliates of the electricity distribution company. It recently concluded that “Distribution companies may transfer assets that have not been included in rate base any may provide service to their affiliates, provided those assets and services are priced at the distribution company’s fully allocated cost. . . . [P]ricing transfers at fully allocated cost will allow customers of the distribution company to share in the economies of scope and scale with the customers of the competitive affiliate. These pricing rules will encourage electric companies to

pursue such economies, which will result in lower costs for distribution company ratepayers and more competition in markets into which electric companies may wish to diversity.” *Id.* at 18. To comply with these rules, Mass. Electric has charged its affiliate NEESCom the rates proposed by Mass. Electric in this proceeding

The logic adopted by the Department was sound and it aptly summarizes the fact that the use of fully allocated costs for the pricing of pole attachments satisfies all three public policy goals. It is such a pricing methodology that is proposed by Mass. Electric in this proceeding. In today’s restructured environment, there are no cross-subsidies by Mass. Electric to Complainants. The rate proposed by Mass. Electric is based on a fair allocation of Mass. Electric’s costs, and balances the interests of electric distribution service customers and the burdens imposed on Mass. Electric’s system by attachers such as Complainants. As such, it merits the Department’s approval.

For all the foregoing reasons, Mass. Electric urges the Department to adopt the rate proposed by Mass. Electric in this proceeding. Mass. Electric furthermore requests that the Department approve the Partial Settlement filed by the Company and Complainants on August 14, 1998. The Partial Settlement seeks to exclude certain contractual issues from this proceeding.

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Respectfully submitted,
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